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No. 02-1580

IN THE

Supreme Court of the United States

RICHARD VIETH, *et al.*,
Appellants,

v.

ROBERT C. JUBELIRER, *et al.*,
Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

Brief of *Amici Curiae* Texas House Democratic Caucus and U.S. Representatives John Lewis, Chris Bell, Martin Frost, Sheila Jackson Lee, and Nick Lampson in Support of Appellants

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Interest of Amici Curiae

The Texas House Democratic Caucus is composed of the 61 Democratic members of the Texas House of Representatives. The Caucus has a direct interest in the constitutional standards governing redistricting because its members participate in the process of redrawing congressional and state legislative district boundaries. See Tex. Const. Art. III, § 28 (state legislative reapportionment); *Perry v. Del Rio*, 66 S.W.3d 239, 242-43 (Tex. 2001) (recognizing congressional redistricting as primarily a legislative matter). *Amici* Representatives Chris Bell, Martin Frost, Sheila Jackson Lee, and Nick Lampson are Members of Congress representing Texas's Twenty-Fifth, Fourth, Eighteenth, and Ninth Congressional Districts, respectively. This past year, Texas has experienced an unprecedented attempt to re-engineer congressional district boundaries that illustrates the need for this Court to clarify constitutional constraints on partisan redistricting.

Representative John Lewis represents Georgia's Fifth Congressional District in the United States House of Representatives. In its recent decision in *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2516-17 (2003), this Court relied on Representative Lewis's testimony and his expertise in assessing the political consequences of redistricting in considering the fairness of Georgia's post-2000 redistricting.[1]

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *amici* state that none of the parties authored this brief in whole or in part and no one other than *amici* or counsel contributed money or services to the preparation and submission of this brief.

Summary of Argument

Since this Court's decision in *Davis v. Bandemer*, 478 U.S. 109 (1986), redistricting has changed in ways that call for more searching review of political gerrymandering claims and that militate in favor of adopting a standard of review that looks more closely at factors such as the process that produced the challenged plan and the shape of the challenged districts.

First, the increased sophistication of redistricting tools means that there is far less reason today to "think that political gerrymandering is a self-limiting enterprise," *Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring in the judgment). While there is still a risk-reward tradeoff, plan drawers are far more able to calibrate the tradeoff than they were in 1986. Technological changes have enabled far more aggressive pursuit of partisan ends than was possible twenty years ago. Current geographic information systems software can be used along with census data and political data to craft plans that cement electoral results into place.

Second, changes in political tactics call for more searching judicial review than *Davis v. Bandemer* contemplated. In particular, they show why this Court must abandon a test of discriminatory effect that depends on evidence from a series of elections. Prior to the post-2000 round of redistricting, no state redrew its districts a second time in a decade, unless under court order. But *amici*'s recent experience in Texas, along with mid-cycle redistrictings in Colorado and South Carolina, as well as impending threats of redistricting in other states, show that over the past forty years, the threat to representative democracy has changed from states *never* redistricting into states redistricting *continually* to dampen any political competition that was not squelched the first time around. In such a world, the procedures by which the challenged redistricting was accomplished become especially relevant. And the tacit green light that *Bandemer*

gave to partisanship has fueled an increasingly bare-knuckled and irregular process.

Third, this Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny militate in favor of more searching review of political gerrymandering claims. *Shaw* recognized that district shape offers a meaningful constraint on an otherwise potentially pernicious process that fails to balance the myriad factors that inform redistricting decisions. More broadly, the fact that the difficulties of proof are so different in *Shaw* cases and political gerrymandering cases creates an incentive for disappointed political factions to dress their claims up in racial terms. As Justice Stevens observed in his concurrence in the judgment in *City of Mobile v. Bolden*, 446 U.S. 55, 88-89 (1980), "surely there is no national interest in creating an incentive to define political groups by racial characteristics." That is what the current standards do. Bbecause it may often be difficult for courts to disentangle partisan and racial motivations, this Court should realign the standards for proving unconstitutionally excessive uses of partisan and racial considerations.

The experience of the *Shaw* cases not only provides a strong reason for rethinking the framework for assessing claims of unconstitutional political gerrymandering; it also suggests the contours of a more appropriate standard. A "predominant" factor test based on factors such as the nature of the legislative process that produced the challenged redistricting or a disregard of traditional districting principles – the sort of test proposed by Justice Stevens in *Bolden*, championed by Justice Powell in *Bandemer*, and applied to claims involving the excessive use of race in the *Shaw* cases – is as judicially manageable as the "consistent degradation" standard articulated by the *Bandemer* plurality. Moreover, the significant decline in *Shaw* claims following the 2000 round of redistricting suggests that articulating a more meaningful constraint on the permissible

degree of partisanship will not significantly expand judicial involvement in the political process.

Argument

I. Since this Court's Decision in *Davis v. Bandemer*, Redistricting Has Changed in Ways That Call For More Searching Review of Political Gerrymandering Claims

To show that a political gerrymander violates the equal protection clause, a plaintiff must show both a discriminatory purpose and a discriminatory effect. *Davis v. Bandemer*, 478 U.S. 109, 127 (1986) (opinion of White, J.). Seventeen years' experience with *Bandemer* have revealed that its framework for considering intent is so toothless that it ignores critical evidence of impermissible partisanship while its test for proving effect is so stringent that with respect to legislative redistricting it has never yet been satisfied. See Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, The Law of Democracy: Legal Structure of the Political Process 886 (rev. 2d ed. 2002) ("*Bandemer* has served almost exclusively as an invitation to litigation without much prospect of redress"); Daniel Hays Lowenstein & Richard L. Hasen, Election Law 197 (2d ed. 2001) (pointing to the complete lack of success in lawsuits based on *Bandemer*).

The result has been exactly what Justice Powell predicted: *Bandemer* signaled a "'constitutional green light' to would-be gerrymanderers." *Bandemer*, 478 U.S. at 173 (Powell, J., joined by Stevens, J., concurring in part and dissenting in part). Moreover, developments in the technology, law, and politics of redistricting since 1986 have made the problem of excessive partisanship even more acute.

A. Technological Changes Have Enabled More Aggressive Pursuit of Partisan Ends

Over the past forty years, this Court has used the equal protection clause to police redistricting in order to ensure "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). Its first use of the clause imposed the requirement of one-person, one-vote. Chief Justice Earl Warren called *Reynolds* his most important opinion "because it insured that henceforth elections would reflect the collective public interest . . . rather than the machinations of special interests." G. Edward White, Earl Warren: A Public Life 337 (1977). But as Justice Harlan soon observed,

> The fact of the matter is that the rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues. The legislature must do more than satisfy one man, one vote; it must create a structure which will in fact as well as theory be responsive to the sentiments of the community.

Wells v. Rockefeller, 349 U.S. 542, 551 (1969) (Harlan, J., dissenting). But even Justice Harlan could not have foreseen the amazing advances in computational power that enable plan drawers today to accomplish feats their predecessors could not have imagined. Current geographic information systems (GIS) software can be used along with census data and political data (such as precinct-level election returns and voter-registration data) to predict with a fair degree of precision the political consequences of particular districting schemes. Plan drawers can "recompile" election returns to see how candidates would

have fared in redrawn districts.[2] Indeed, one of the leading software packages on the market, Maptitude, allows users to automatically generate "all the feasible alternatives" that satisfy a user's constraints on population deviation, racial composition, incumbency protection, and political competitiveness, and then to "[f]ine-tune your most promising plans using the traditional manual selection tools."[3]

This Court first confronted the effects of more finely grained census data and more overwhelming computational power in its *Shaw* cases, and it did not like what it saw: highly irregular, multi-sided districts drawn for the purpose of promoting the electoral fortunes of certain groups while relegating others to the status of "filler people." But it is critical to remember that such districts were the product of political as well as racial considerations. See *Bush v. Vera*, 517 U.S. 952, 1019 & n.18 (1996) (Stevens, J., dissenting) (describing the contours of the majority-Anglo, heavily Republican Sixth Congressional District).

Moreover, the increased sophistication of redistricting tools means that there is far less reason today to "think that political gerrymandering is a self-limiting enterprise," *Bandemer*, 478 U.S. at 153 (O'Connor, J., concurring in the judgment). While there is still a risk-reward tradeoff, plan drawers are far more able to calibrate the tradeoff than they were in 1986. As one district court judge recently faced with a political

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[2] For a relatively accessible discussion of the new technology, see Lisa Handley, A Guide to 2000 Redistricting Tools and Technology in The Real Y2K Problem: Census 2000 Data and Redistricting Technology 27 (Nathaniel Persily ed. 2000).

[3] See www.caliper.com/Redistricting/autodistrict.htm.

gerrymandering case observed:

> Floridians should be proud, perhaps, of the innovative FREDS [Florida Redistricting] software and the technical proficiency with which it has been applied, but not of the degree of political gerrymandering that drove these plans. Floridians should perhaps be proud, instead, when an apportionment plan is adopted in an effort to be fair to all, rather than in an effort to optimize the outcome for one party or the other.
>
> Political gerrymandering is as old as the republican form of government.... Still, the issue has recently taken on a different dimension; the "sea change" of advancing technology, as one witness described it, has substantially increased the extent of successful political gerrymandering that is achievable, as a few minutes online with FREDS will confirm.

Martinez v. Bush, 234 F. Supp. 2d 1275, 1351-52 (S.D. Fla. 2002) (three-judge court) (Hinkle, J., concurring).

B. Changes in Political Tactics Call For More Searching Judicial Review than *Davis v. Bandemer* Provides

Justice White's decision in *Bandemer* downplayed the relevance of factors such as "the nature of the legislative procedures by which the challenged redistricting was accomplished" or "the shapes of the districts and their conformity with political subdivision boundaries," *Bandemer*, 478 U.S. at 138 (opinion of White, J.), in favor of considering whether "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole," *id.* at 132.

In answering this question, Justice White rejected the idea of "[r]elying on a single election to prove unconstitutional discrimination." *Id.* at 135. Without a finding that the challenged reapportionment "would consign the Democrats to a minority status . . . throughout the 1980"s," *id.*, a court simply could not find the requisite discriminatory effect.

But a striking change in redistricting tactics explains why this Court must abandon a test of constitutionality that depends on evidence from a series of elections. In the past 50 years, no state has redrawn its districts a second time in a decade, unless under court order, according to the Congressional Research Service.[4] But that is changing. As recent experiences in Texas and Colorado demonstrate, states are poised to move from the pre-*Reynolds v. Sims* world in which they *never* redistricted into a world in which redistricting occurs *continually*. In such a world, the "nature of the procedures by which the challenged redistricting is accomplished" become especially relevant.

1. The Texas Experience

The Texas Constitution provides that the State Legislature "shall, at its first regular session after the publication of each United States decennial census, apportion the state into senatorial and representative districts." Tex. Const. Art. III, § 28. Although the Constitution does not explicitly address congressional districts, the Legislature's consistent practice has been to address congressional districting in a similar manner.

Following the 2000 census, Texas was allotted two

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[4] Allison Stevens, DeLay Has His Eye on Tex. Map, The Hill, Feb. 5, 2003 (www.hillnews.com/news/020503/delay.aspx).

additional seats in the House of Representatives. This fact, and population shifts within the state, required redrawing the state's congressional districts.

During the regular 2001 session of the Texas Legislature, the legislature was unable to agree upon a congressional redistricting plan. As a result, after deferring its proceedings in order to enable the state courts to address the issue, a three-judge federal district court, with Judge Patrick Higginbotham presiding, redrew Texas's congressional districts. *Balderas v. Texas*, No. 6:01Civ158 (E.D. Tex. Nov. 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002).[5] In crafting the new map, the district court began by "dr[awing] in the existing Voting-Rights-Act-protected majority-minority districts." Slip op. at 5. It then located the two new seats in the areas of greatest population growth, following both prevailing social scientific views and Texas Legislature's own prior practice. See *id.* at 6. "With a large part of the Texas map thus drawn," *id.*, the court then looked to the location of prior political boundaries, emphasizing compactness and contiguity, and "struggl[ing] to follow local political boundaries," *id.* at 7. As a result, the court eliminated some of the most "patently irrational shapes" of previous districts.[6] Finally, the court considered whether the plan "was avoidably detrimental to Members of Congress of either party holding unique, major leadership positions," *id.* at 8 – it was not – and determined that the "general partisan" effect of the plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state," *id.* at 9. The judgment made the plan effective

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[5] The district court's unpublished opinion is available at http://gis1.tlc.state.tx.us/static/pdf/opinion.pdf.

[6] Including the seat ridiculed by Justice Stevens in his dissent in *Bush v. Vera*, 517 U.S. at 1019 n.18.

until release of the next federal decennial census in 2011. The state did not appeal the judgment.

The 2002 congressional elections, the first held under the new plan, produced a Texas congressional delegation with seventeen Democrats and fifteen Republicans. Five of the Democratic candidates were elected from districts that voted for Republicans in statewide elections.

As a result of the 2001 state legislative redistricting (which was carried out by the Republican-controlled Legislative Redistricting Board, after the Legislature failed to produce a plan), Republicans gained control of both the Texas House and Texas Senate. The newly dominant Republicans, spurred on by Representative Tom Delay, decided to redraw the state's congressional districts, solely for the purpose of seizing between five and seven seats from Democratic incumbents. (There was, of course, no legal, as opposed to political, imperative for changing the district boundaries.)

The Republicans' attempt to ram through a new congressional map produced an unprecedented level of hostility and procedural wrangling within the Legislature. During the regular legislative session, Democrats were forced to break the quorum to prevent the bill from passing. When the Republican Speaker of the House and Governor asked state law enforcement officials to physically compel them to return, the lawmakers left the state and traveled to Oklahoma. Republican officials then took the outrageous step of asking for federal assistance from the Department of Homeland Security, the Department of Transportation, and the Department of Justice.[7]

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[7] In the subsequent investigation, the Acting Attorney General in charge of the Justice Department's Office of Legal Counsel told the Office of the Inspector General that he

U.S. Dept of Justice, Office of the Inspector General, An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators (Aug. 12, 2003) (www.usdoj.gov/oig/special/03-08a/final.pdf).

Subsequently, the Governor has called two special sessions in an attempt to force through a new plan. The first session never voted on congressional redistricting because of the longstanding requirement that two-thirds of the senators agree to bring a measure to the floor.[8] So the Governor announced his intention to call yet another special session and the Republican Lieutenant Governor announced the that he would not honor the two-thirds rule. The House and Senate unexpectedly adjourned the first special session a day early, whereupon the Governor called a special session to begin *five*

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considered the requests to be "wacko." U.S. Dept of Justice, Office of the Inspector General, An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators at 5 (Aug. 12, 2003).

[8] The Senate employs a practice known as the "blocker bill." A piece of non-controversial legislation is placed first on the Senate's formal legislative agenda each session. Senate rules require bills on second reading to be considered in their "regular order of business," in the order that the bills come out of the committee. Tex. Sen. Rule 5.12. It takes the vote of two-thirds of the members present to suspend any rule, including the rule establishing the regular order of business Tex. Sen. Rule 5.13; 16.06(6); 22.01. With the "blocker bill" in place, no other bill introduced in the Senate during that session can be moved ahead of that bill for consideration without the vote of two-thirds of the senators present. Twelve of the thirty-one senators were unwilling to have the redistricting bill moved ahead of the blocker bill.

minutes later. In order to avoid being steam rolled, eleven Democratic senators immediately left the state for New Mexico.

The Governor has indicated he will continue calling special sessions until the Republican redistricting plan is enacted. Meanwhile, he and the Lieutenant Governor filed a mandamus action against the absent legislators, seeking a judicial order that they return. That request for mandamus was denied by the Texas Supreme Court. *In re Rick Perry et al.*, No. 03-0726 (Tex. S. Ct. Aug. 11, 2003) (www.supreme.courts.state.tx.us/Advisory/Advisory%202003-08-11.html). And Republican legislators have undertaken an unprecedented campaign to punish their Democratic colleagues, voting to fine them up to $5,000 per day, and to revoke privileges for their staffs. In a rare show of petty spite, they have even forbid absent legislators from obtaining flags that have flown over the capitol to give to bereaved constituents. See Gromer Jeffers, Jr., Runaway Democrats Expand Lawsuit; Dewhurst Aide Says Maneuver an Attempt to Stall Redistricting, Dallas Morning News, Aug. 21, 2003, at 3A.

2. The Colorado Experience[9]

Following the 2000 census, Colorado received a seventh congressional seat. The General Assembly failed to agree on a new plan. As this Court had "specifically encouraged" in

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[9] In addition to the sources cited in the text, the facts in the following discussion are taken from T.R. Reid, GOP Redistricting: New Boundaries of Politics?, Wash. Post, July 2, 2003, at A4; A Dirty Deed Beneath the Dome, Denver Post, May 6, 2003, at B6; John J. Sanko, Redistricting Passes; Senate GOP Votes 18-0 for New Map After Dems Walk Out, Rocky Mountain News, May 8, 2003, at 4A.

Growe v. Emison 507 U.S. 25, 33 (1993); see also *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam), the state judiciary stepped in. After a full hearing at which numerous groups of citizens and legislators presented their views, a state district court drew a plan that adhered to the following criteria: equal population among districts, avoidance of minority vote dilution, "compactness and contiguity, preservation of county and municipal boundaries whenever possible, and preservation of community of interest." *Avalos v. Davidson*, No. 01 Civ 2897, slip op. at 3 (Denver Dist. Ct. Jan. 25, 2002)[10] The state court did not consider either partisan effects or incumbent protection in drawing its plan. See *id.* at 4. Still, in fashioning the new congressional district, the state court remarked that the district should be "competitive" in order to encourage voter interest. *Id.* at 9.

The 2000 elections produced a new Republican majority in the Colorado state senate, giving Republicans control over both the legislative and executive branches. For the first time in Colorado history – Colorado had used court-generated plans for entire decades previously – the General Assembly redrew the borders of the state's congressional districts mid-cycle solely to strengthen the Republicans' hold on what would otherwise have been competitive seats.

The president of the state senate, John Andrews, was candid about this entirely partisan goal. Referring to the two districts that had experienced close races, he wrote: "[t]he Democrats' failure to win either seat in 2002 was small comfort. The numbers were going to favor them in time. America is better served by Congress as it is. To help keep it that way, we set our sights on correcting . . . [the state court's]

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[10] The state court's unpublished opinion is available at www.state.co.us/gov_dir/reap/Data/REAP-01CV2897.pdf

map." John Andrews, Districts Remapped in Public Interest, Rocky Mountain News, June 9, 2003, at 30A.

In contrast to the state court proceedings, which had given a variety of interested parties a full opportunity to offer proposals and comment on potential plans, the new redistricting bill was introduced on a Monday (and assigned to the Senate Committee on Veterans and Military Affairs), passed on a Wednesday and signed into law the same Friday under streamlined rules with little debate and no opportunity for public participation.

The new plan took the Seventh Congressional District, which had experienced the most competitive race in the nation in 2002 – in a contest for an open seat, Republican Bob Beauprez had defeated Democrat Mike Feeley by 122 votes out of 162,938 cast – and transformed it into a safe Republican seat, by giving Republicans an overwhelming 141,854 to 113,876 edge among registered voters. It also moved Feeley's home out of the district. In a similar vein, under the pre-existing plan, voter registration in the Third Congressional District was 33 percent Democratic, 34 percent Republican, and 34 percent unaffiliated. The mid-cycle plan gave Republicans a substantial 159,889- 139,122 advantage.

Needless to say, Colorado's redistricting is back in the courts. See Petition in *People ex rel. Salazar v. Davidson* (Colo. S. Ct. May 14, 2003).[11]

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[11] Available at www.state.co.us/gov_dir/REAP/Congressional/Salazar_v_Davidson.pdf).

3. The Risk of Further Mid-Cycle Redistricting

Colorado and Texas may be only the opening wedge in a process of escalating and retaliatory redistricting. Precisely because Congress is a "national body representing the interests of a single people," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 822 (1995), we can expect that if Republicans act to increase the Republican majority in the U.S. House of Representatives by rejiggering the lines in states that they control, Democrats will respond by redrawing lines in states where they are in power. Recent press accounts suggest that several states are contemplating undertaking mid-cycle redistricting. See, e.g., Juliet Eilperin, Deciding Where to Draw the Lines, Wash. Post, Aug. 20, 2003, at A6 (reporting that Ohio Republicans are considering whether to introduce legislation to redraw districts in the northeastern part of the state to undercut the political base of several incumbent Democratic Representatives); Josh Kurtz, Richardson Rides to the Rescue; May Tackle Redistricting in New Mexico if Texas Changes Boundaries, Roll Call, June 23, 2003 (reporting that Democrats in New Mexico and Oklahoma are considering redrawing their congressional district boundaries if Texas redraws its lines).

4. Other Recent Examples of Excessive Partisanship

Excessive partisanship has tainted redistricting on the local level as well. One particularly striking example, which also illustrates how courts strain to address constitutionally suspect conduct through other doctrinal tools because the *Davis v. Bandemer* test has proved insufficient involves the post-2000 redistricting of the Madison County, Illinois, County Board.

According to the federal district court that adjudicated a

challenge to the 2001 plan, the Madison County process "demonstrated the worst of politics. The process fell so far short of representing the electorate that it seems the citizens of Madison County were not so much as an afterthought. . . . Far from some semblance of bipartisanship, the reapportionment process in Madison County was characterized by threats, coercion, bullying, and a skewed view of the law." *Hulme v. Madison County*, 188 F. Supp. 2d. 1041, 1044 (S.D. Ill. 2001). Among the more egregious examples the court described were the following: at an early committee meeting, Democrat Wayne Bridgewater, the chair of the redistricting committee, announced that he planned to "cannibalize" Republican districts. *Id.* at 1049. At another meeting, when a Republican member of the Board approached him to express objections to the proposed plan, Bridgewater declared, "We are going to shove it [the map] up your f------ ass and you are going to like it, and I'll f— any Republican I can." *Id.* at 1051. And at the final meeting where the Board approved Bridgewater's plan, he tore up a Republican proposed map. *Id.* The plan the Board adopted split substantially more precincts than alternative plans, took a township that could have supported two whole districts and divided it among three districts diluting its influence, and paired two Republican incumbents. See *id.* at 1051.

Ultimately, despite the fact that the plan's total deviation of 9.3 percent placed it within the safe harbor of this Court's decisions in *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *White v. Regester*, 412 U.S. 755 (1973) – which had held that deviations of less than ten percent create a presumption that the challenged plan was an "honest and good faith effort" to construct equipopulous districts, *Reynolds*, 377 U.S. at 577 – the district court held that the plan violated one-person, one-vote because "the apportionment process had a 'taint of arbitrariness or discrimination.'" *Hulme*, 188 F. Supp. 2d at 1086 (quoting *Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964))). In

short, although the vices of the process that had produced the plan had relatively little to do with the size of the population deviation – after all, the alternative plan to which the district court pointed had a deviation of 8.51 percent, rather than 9.3 percent, *Hulme*, 188 F. Supp. 2d at 1050 – and much to do with excessive partisanship, the district court used the doctrinal tool at hand to strike down the product of a deeply disturbing process.[12]

C. The *Shaw* Cases Justify More Searching Review of Partisan Gerrymanders

In *Shaw v. Reno*, 509 U.S. 630, 647 (1993), this Court observed that "reapportionment is one area in which appearances do matter." This was not because compactness, contiguity, respect for political subdivisions, or geographic regularity are constitutionally required – as the Court noted, "they are not," *id.* – but because they are reasonably objective

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[12]For another recent example of excessive partisanship, consider the events surrounding the Virginia state legislative apportionment. Edmund A. Matricardi III, the executive director of the Virginia Republican Party, pleaded guilty to a federal felony and Gary Thomson, the Party Chairman, and Claudia Tucker, the chief of staff to the Republican then-Speaker of the House of Delegates, pleaded guilty to federal misdemeanors connected to Matricardi's illegally listening in on a telephone conference call among Democratic Party leaders and their lawyers concerning litigation strategy in a challenge to the Republican-driven state legislative reapportionment. See R.H. Melton, GOP Chairman Guilty In Va. Eavesdrop Case; Chief Admits Role in Snooping on Democrats, Wash. Post, Aug. 13, 2003, at B5; R.H. Melton, Va. GOP's Ex-Chief Fined in Scandal, Wash. Post, July 9, 2003, at B6.

factors that constrain an otherwise potentially pernicious process. While this Court's decisions make clear that race can be *a* factor in the decision about where to draw district lines, see, e.g., *Easley v. Cromartie*, 532 U.S. 234, 253 (2001); *Miller v. Johnson*, 515 U.S. 900, 915 (1995), they provide that race cannot play too predominant a role. "When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy." *Shaw*, 509 U.S. at 648.

Bandemer suggests how a similar danger might exist in overly aggressive partisan gerrymanders. The Court was unwilling to assume that a representative "will entirely ignore" the interests of a cognizable group of voters, "even in a safe district where the losing group loses election after election." *Bandemer*, 478 U.S. at 132. That is no doubt true for many districts. But at some point, a highly irregular and explicitly partisan process or the inability to explain the boundaries of a district as reflecting anything other than an attempt to achieve political advantage will surely send a message to the representative that he or she need *not* represent members of the losing faction.

More broadly, the fact that the burden of proof in a political gerrymandering case brought under *Bandemer* is so much heavier than the burden faced by a plaintiff in a racial vote dilution claim under amended section 2 of the Voting Rights Act, 42 U.S.C. § 1973, see, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986) (decided the same day as *Bandemer*), or a racial gerrymandering claim brought under *Shaw* has had pernicious effects on the political process. Disappointed participants in the redistricting process – and there invariably are some – have every incentive to recast their political disagreements as racial

ones. See Pamela S. Karlan, The Rights to Vote: Some Pessimism About Formalism, 71 Tex. L. Rev. 1705, 1733-35 (1993) (describing how political parties have tried to "commandeer" the Voting Rights Act for political advantage); Pamela S. Karlan, Still Hazy After All These Years: Voting Rights in the Post-*Shaw* Era, 26 Cumb. L. Rev. 287, 297 n.60 (1996) (noting how several *Shaw* lawsuits were "stalking horse cases in which disappointed aspirants for elective office use whatever statutory handle is available to challenge the otherwise unreviewable outcomes of the political process"). A regime in which courts apply relatively more searching review to challenges to irregularly shaped majority-nonwhite districts than they do to irregularly shaped majority-white districts is inherently unstable, particularly in a world where race and political affiliation often coincide, see, e.g., *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2506 (2003). Precisely because it may often be difficult for courts to disentangle partisan and racial motivations, and because creating a situation in which political actors face an incentive to discuss their disagreements in racial, rather than political, terms is so damaging to the democratic process, this Court should realign the standards for proving unconstitutionally excessive uses of partisan and racial considerations. As Justice Stevens observed in his concurrence in the judgment in *City of Mobile v. Bolden*, 446 U.S. 55, 88-89 (1980), "surely there is no national interest in creating an incentive to define political groups by racial characteristics." But as long as the Constitution is interpreted to make it easier to challenge an irregularly shaped district by claiming it is a racial gerrymander than it is to advance a political claim, "such an incentive [will] inevitably result."

II.. A "Predominant" Factor Test Based on Factors Such as the Nature of the Legislative Process that Produced the Challenged Redistricting or a Disregard of Traditional Districting Principles Is Judicially Manageable

This Court's experience with the *Shaw* cases not only provides a strong reason for rethinking the framework for assessing claims of unconstitutional political gerrymandering; it also suggests the contours of a more appropriate standard. Not only is there a more meaningful, but nonetheless judicially manageable, way of reviewing political gerrymandering claims, but the significant decline in *Shaw* claims following the 2000 round of redistricting suggests that articulating a more meaningful constraint on the permissible degree of partisanship will not significantly expand judicial involvement in the political process.

This Court's *Shaw* jurisprudence rests largely on assessment of precisely the factors that Justice Stevens identified in his concurrence in *Karcher v. Daggett*, 462 U.S. 725, 753-61 (1983), and Justice Powell discussed in his concurrence and dissent in *Bandemer*, 478 U.S. at 173: the shapes of the challenged districts; their adherence to established political subdivision boundaries; the nature of the legislative procedures that produced them; and the goals reflected in the legislative history. See, e.g., *Miller*, 515 U.S. at 907-09, 917-20 (discussing the shape of the challenged Eleventh Congressional District, its splitting of political subdivisions, and the Department of Justice's heavy involvement in the redistricting process). And this Court has long indicated that "[t]he specific sequence of events leading up to the challenged decision ... may shed some light" on whether the decisionmaker acted with an invidious or a permissible purpose. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977). This Court's experience with the

application of a predominant purpose test in a variety of situations suggests that it could extend such an inquiry to political gerrymandering claims.

It is true that *Shaw v. Reno* unleashed a flood of litigation. See Issacharoff, Karlan & Pildes, supra, at 905-06. But there has been a striking decline in such litigation following the post-2000 round of redistricting. One reason for this decrease is that legislators complied with the Court's ban on excessive reliance on race in the redistricting process, even as they continued to use race as one among many factors. There is every reason to think that a straightforward declaration by this Court that while partisan considerations can play *some* role in redistricting, they cannot completely subordinate such traditional districting principles as compactness and contiguity, respect for political subdivision boundaries and the cores of prior districts, and only one round of redistricting per decennial census will have an equally salutary effect.

Conclusion

For the foregoing reasons, *amici* urge this Court to reverse the decision of the United States District Court for the Middle District of Pennsylvania.

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